No. 14897.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

G. de BRETTEVILLE and TREASURE COMPANY, a corporation,
Appellants,

vs.

WALTER B. SCOVILLE and THE ADAMANT COMPANY, a corporation,
Appellees.

HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD and MARIAN S. HAYWARD,
Appellants,

vs.

G. de BRETTEVILLE, TREASURE COMPANY, WALTER B. SCOVILLE and THE ADAMANT COMPANY, a corporation,
Appellees.

REPLY BRIEF OF ADAMANT COMPANY AND WALTER B. SCOVILLE, APPELLEES.

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REPLY BRIEF OF ADAMANT COMPANY AND WALTER B. SCOVILLE, APPELLEES.

Statement of Facts.

The complaint in this case was filed September 10, 1941 (over 14 years ago). Over 16 years ago and on December 14, 1939, Bullen and Hayward filed suit in the state court upon the same letter written by Bullen to his attorney Halverson and dated September 27, 1938, upon which they base their Complaint in Intervention in the case at bar. [Tr. p. 78.]

This Complaint in Intervention of Bullen and Hayward was filed January 29, 1953, in the case at bar. (More than six years after the California statute of limitations had barred their action.)

The September 27, 1938, letter provided: "* * * these funds, $5,000.00 * * * to be repaid two for one out of the *first* 15% of gross production from the said well." [Tr. p. 79.]

It was stipulated that the well produced $205,411.68 (from 1938 to September 28, 1942, when taken by condemnation in case 2454-B-HW of this same district court) [Tr. p. 167] and that all of those moneys were handled by Treasure Company and Mr. deBretteville. [Tr. p. 167.]

> "Mr. Hoge: My only purpose is to show that there was sufficient production to repay *this investment* out of 15 per cent of the production of the well." [Tr. p. 167.]

There is no evidence to sustain the statement in the Bullen and Hayward brief at page 5 that the $13,000.00 included the $5,000.00 put up by Bullen and Hayward.

Herschel Bullen testified as follows:

> *"Cross-examination*
>
> Q. (By Mr. Allen): And the two for one *was not chargeable* to Mr. Scoville's personal interest, was it? A. I think that's right.
>
> Q. That's right. In other words, *it was not chargeable* to Mr. Scoville's personal interest, nor to Mr. Bodkin's nor to yours, nor to Mr. Hayward's; isn't that right? A. That's right.
>
> Q. But it was to come out of total production? A. That's right." [Tr. p. 146.]

The trial court in the case at bar ruled:

> "Formal findings and judgment to be prepared by Messrs. Nicholas and Mack, counsel for the defendants, under Local Rule 7." [Tr. p. 94.]

THE PLEADINGS ADMIT THAT THE $13,000.00 WAS PAID INTO THE COMPLETION FUND OF THE WELL BY THE PLAINTIFFS (ADAMANT COMPANY AND SCOVILLE) AND SAID FACT IS ALSO SHOWN BY THE EVIDENCE INTRODUCED BY THE PLAINTIFFS AND CONTAINED IN THE PARKER AUDIT.

Plaintiffs pleaded in the Second Amended and Supplemental Complaint, the stipulation, in full, in the so-called Vickers case in which the attorney for deBretteville and Treasure Company *admitted* that the "$13,000.00 which ultimately went into the fund for the completion of the well." [Tr. pp. 4-5.]

The answer in the case at bar fails to deny this allegation of the stipulation and, hence, admits it to be true.

Parker Audit [Pltf. Ex. 2] reads, in part, as follows:

> "Cash Receipts: Percentage Holder*s* Loan $13,-000.00."

The Parker Audit reads *in the plural* which means Adamant Co. and Scoville.

The Original Complaint filed *by Adamant Company and Scoville* in the case at bar contains this pleading:

> "That the defendants failed and refused to so co-operate and to put up their share of the monies so required, and the plaintiff*s* were thereby compelled and did raise an additional thirteen thousand ($13,-000.00) dollars or more, in cash, and secured a guarantee for the payment of the necessary casing, and other material, in the amount of twenty-four thousand, one hundred and twenty-eight ($24,128.54) and 54/100 dollars, which said sum includes some additional cash."

In the Answer filed by deBretteville and Treasure Company *to* the Original complaint are the allegations, reading as follows:

"That thereupon plaintiffs (Adamant Company and Scoville) herein, pursuant to said agreement furnished $5,000.00 to enable work to be started * * *"

"That the plaintiffs thereafter advanced the sum of $6500.00 and no more for use in the completion of said well * * *."

(N. B. The stipulation admitted $13,000.00 (not just $11,500.00).)

The Findings in the Vicker's case *placed in evidence* in the case at bar by deBretteville and Treasure Company contained the following Finding:

"It was stipulated in open Court by counsel for all parties that the question of whether the defendants, or either of them, are chargeable with any part of the sum of $13,000.00, being the amount, in addition to the original $10,000 paid by plaintiffs Walter B. Scoville and The Adamant Company to complete said well, shall be left for determination at a future date, without prejudice to the rights of any party hereto, and need not be determined herein, and hence the Court makes no finding thereon."

The plaintiffs (Scoville and Adamant Company) asked for an accounting from both defendants (deBretteville and Treasure Company) of all moneys that went into this venture which moneys include their original $10,000.00 and the additional $13,000.00. *It wasn't just* Scoville who asked for the accounting as the appellants would now contend.

We submit that by stipulation, by evidence contained in the Parker Audit, and by the admissions of the pleadings, both plaintiffs Adamant Company and Scoville have established the fact that the $13,000.00 was advanced by them and the trial court was justified in rendering a judgment for both plaintiffs and against both defendants.

ARGUMENT.

The Transcript of Record Prepared by Appellants Deforms the Facts and Quotes Portions Suitable to Appellants Omitting Portions Favorable to Appellees.

One example follows.

The asterisks at page 199 of Transcript indicates the omission of very pertinent testimony given by appellant deBretteville.

He had testified that: He wrote all the checks of Treasure Company. That he never declared a dividend. That Treasure Company never declared a dividend. That he received a check on March 3, 1950, payable to Treasure Company in the sum of $67,775.85. That he paid out said sum of money from the bank account of Treasure Company *to himself* in the following amounts:

March 31, 1950, to G. de Bretteville	$27,775.85
June 15, 1950, to Trust Oil Co. (his corporation)	200.00
July 1, 1950, to G. de Bretteville	20,000.00
August 4, 1950, to G. de Bretteville	19,000.00
August 5, 1950, to Trust Oil Co. (his corp.)	323.00
November 8, 1950, to Edris deBretteville (wife)	476.00
(All but $1,000 to himself)	Total $67,774.85

There are *many portions* of this printed record containing asterisks and thus indicating a *selection of evidence* by the appellants.

Appellees submit that the printed transcript *does not reflect a true report of* the proceedings at *the trial.*

The Statute of Limitations Has No Application to the Repayment of the $13,000.00 From the Income From Treasure Well No. 8.

The money was not a gift and the money was accepted by deBretteville and his Treasure Company and put into the completion of the well and thus made its ultimate production possible.

There is a fiduciary relationship in this joint venture and defendants stand in a position of trustees who must handle the funds of the project with utmost good faith. It was the duty of the defendants to remit to plaintiffs the sum of $13,000.00 out of the production of $205,-411.68 realized by the venture. [Tr. p. 167.]

The Vickers findings and judgment introduced into the evidence *by appellants* in the case at bar declared this to be a joint adventure.

G. deBretteville or his Treasure Company *has never repudiated this trust.* He simply failed to pay the obligation impressed upon the trust fund by the terms of the acceptance of the $13,000.00.

The said statute of limitations (2 years) Section 339(1) of the California Code of Civil Procedure *does not apply* to any of the allegations required *in this accounting action.*

> "In all matters connected with his trust, a trustee is bound to act in the highest good faith towards his beneficiary and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."
>
> Cal. Civ. Code, Sec. 2228.

> "In 2 Perry on Trusts, section 863, the rule is stated as follows: 'As between trustee and *cestui que trust,* in the case of an express trust, the statute

of limitations has no application, and *no length of time is a bar.* Against an express and continuing trust time does not run *until repudiation* or adverse possession by the trustee and *knowledge thereof* on the part of the *cestui.* . . . The trustee must clearly repudiate the trust and assume an adverse position, *with notice* to the *cestui,* before the statute can begin to run. . . . and *the section applicable to causes of action for an accounting* is section 343 (Code of Civil Procedure) *4-year statute.'"* (Emphasis added.)

Allsopp v. Joshua Hendy Machine Works, 5 Cal. App. 228-234.

The complaint seeking an accounting was filed in the case at bar on September 10, 1941. The well produced until September 28, 1942, when taken in condemnation by the government.

Appellees submit that the 4-year statute of limitations had not run and that the accounting upon the $10,000.00 and the $13,000.00, put into the venture by appellees, was required.

The Liability of deBretteville Is Fully Established.

He was the corporation known as Treasure Company and he conducted its affairs for his own benefit and as a screen for his own operations.

He admitted on the witness stand that he had the Board of Directors execute a purported power of attorney:

"* * * giving to the President, G. deBretteville, full power and authority to do and perform every requisite necessary in his judgment *as this Board of Directors would or could do."* [Tr. pp. 205-206.]

He admitted on the witness stand that he wrote all checks of Treasure Company, that he and the company never declared a dividend and that he wrote checks and signed same as president of said company to himself individually in the total sum of $66,775.85.

We submit that he operated the company as his own and that he knew when he took this $66,775.85 that an action was pending for a full accounting in the case at bar.

We submit further that the trial court held that he had money of the corporation in his possession and hence rendered a judgment against him.

The Report of the Special Master Who Handled the Accounting Matter Disallowed Improper Charges Against the Well Amounting to $34,833.49 but Was Not Followed by the Trial Court.

The Report of the Special Master [Tr. pp. 36-58] disallowed charges against this well made by deBretteville in the sum of $34,833.49.

This sum should have been credited by the trial court to the owners of the 80.6 working interests. Since these appellees owned 41 working interests their portion amounted to $17,718.97 of these disallowed and improper charges.

$61,627.16 was the value of the capital assets of the venture and should have been credited to the 80.6 working interests. This was not done by the trial court.

The appellants deBretteville and Treasure Company *are many thousand of dollars ahead* when the trial court refused to follow the Master's Report, and, allowed all of these improper charges.

The trial court gave appellees a judgment for $13,000.00 only and that was because they had advanced said amount in order that the well could be completed.

We submit that the appellants have no cause for complaint. Appellees should have had judgment for $13,000.00 *with interest* from September 28, 1942, and $17,718.97 being their portion of the improper charges which were disallowed by the Master and their portion of the value of the capital assets—which figures approximately $64,000.00. And all we received was $13,000.00 without interest in this judgment.

Argument Pertaining to the Appeal of Bullen and Hayward.

The Admission Under Oath of Mr. Bullen That the ($10,000.00) Two for One Was Not Chargeable to Any Individual Interests but "Was to Come Out of Total Production" Should End Their Appeal and Affirm the Judgment of the Trial Court.

An admission by the appellant that he has no charge against anyone's interest in the well is sufficient to terminate this appeal which should never have been filed, by reason of such an admission. [Tr. p. 146, testimony of Bullen.]

It certainly refutes the now claim of his attorney that Adamant Company's interest or Scoville's interest stands as security for the payment of something that "was not chargeable to any personal interest."

The Statute of Limitations Bars the Complaint in Intervention.

"The first 15% of gross production of said well" *was available* long before September 28, 1942, with total production of $205,411.68, on that date. This sum is the only *"res"* to which Bullen and Hayward could have any claim.

California Code of Civil Procedure, Section 337, requires an action upon a written contract to be brought within four years.

At the very latest this complaint in intervention must have been filed by September 28, 1946 (probably by 1944 as "the *first* 15% of gross production" exceeded the $10,000.00 due on the alleged two for one letter). *The filing of the intervention on January 30, 1953, was too late.*

We quote from California decisions:

> "* * * a complaint in intervention sets up a new cause of action, and admittedly also in favor of a third party, and the *doctrine of relation does not apply.* To determine, therefore, whether the action has been brought prematurely, or whether the *statute of limitations has run against it,* we must look to the *date* of the filing of the complaint in intervention and not of the filing of the original complaint." (Emphasis added.)
>
> *Graham v. Cal. Drilling, etc., Co.,* 49 Cal. App. 2d 522-526 (Feb. 1942) (*many cases quoted in opinion*).

> "The United States courts follow the decisions of state courts in respect to the construction of local statutes of limitations."
>
> *Security Trust Co. v. Black River Nat'l Bank,* 187 U. S. 211;
>
> *Dibble v. Bellingham Bay Land Co.,* 163 U. S. 63;
>
> *Great Western Tel. Co. v. Purdy,* 162 U. S. 329.

Appellees submit that the statute of limitations barred the filing of the Bullen and Hayward complaint in intervention and the trial court so ruled.

THE FACT THAT THERE IS NO ENFORCEABLE LIEN AGAINST ADAMANT COMPANY AND SCOVILLE WAS DECIDED IN THE CONDEMNATION ACTION AND IS NOW RES JUDICATA BETWEEN THESE SAME PARTIES.

The application of the statute of limitations renders further response to Bullen and Hayward brief *unnecessary.*

However the following:

They now insist that they have an enforceable lien against that part of production owned by the parties to the two for one letter or alleged agreement.

(N. B. The condemnation jury award is *no part of the production* of the well as the production was $205,411.68 received by deBretteville and Treasure Co.)

They appealed and filed an Opening Brief in the condemnation case No. 12961 of this Court of Appeal's files and they presented these points among others:

1. "The two for one agreement is a royalty."

(N. B. There are only 100 1 per cent oustanding royalties of which Bullen and Hayward owned 2, hence this bonus of $10,000.00 could not be a royalty.)

2. "The two for one agreement is binding on all owners of the working interest."

3. "The two for one agreement is at least a charge on the interest of Walter B. Scoville."

4. "The appellants * * * have an equitable lien upon the interest in the well of the lessee, Treasure Company, to secure the payment to them of their share of the net proceeds of the operation."

All four points were decided against Bullen and Hayward and are now res judicata.

They cited *practically all* of their present authorities in their opening and reply briefs and their petition for a writ of certiorari in the former appeal in the condemnation matter. (Cir. Ct. No. 12961.)

They relied extensively upon the case of *Recovery Oil Co. v. Van Acker,* 96 Cal. App. 2d 909, but Adamant Company, Scoville, *et al.,* in their Reply Brief quoted fully from said case and showed that its decision applies only to an actual oil royalty and not to a Bullen & Hayward bonus contract (over and above the 100 per cent royalties) a vital distinction.

See:

United States v. Adamant Company, 197 F. 2d 1.

THE CONDEMNATION JUDGMENT IS RES JUDICATA OF ANY CLAIMED LIEN UNDER THE TWO FOR ONE LETTER.

The federal judicial procedure in eminant domain lies partly in equity and partly in law.

> "Federal Judicial Procedure in this field lies partly at equity and partly at law. (Searl v. School District, 124 U. S. 197, 199, 8 S. Ct. 460, 31 L. Ed. 415.)"
>
> *Welch v. Tennessee Valley Authority* (1939), 108 F. 2d 95-98 (cert. den., 1940).

Bullen and Hayward at pages 35 to 49 of their brief try to limit the condemnation action as a *limited* matter governed only by statute.

Then *why* did they submit their documents and oral testimony to Judge Westover to have him determine if they had any lien against Adamant Company or Scoville's interests in the condemnation award?

Now that they lost, they claim the court had no jurisdiction.

The equity jurisdiction invested in the condemnation hearing permitted a proper decision of these matters and they become *res judicata.* Even the "law" jurisdiction of the court permits such adjudication.

The Adamant Company and Scoville Are Not Bound by the Two for One Letter.

Judge Westover ruled that

> "Neither the Treasure Company nor The Adamant Company executed said agreement between Walter B. Scoville and the Bullens and Haywards as parties, nor were said Treasure Company or the Adamant Company parties thereto, nor are the said Treasure Company or The Adamant Company bound thereby." [Tr. p. 146, Finding XXV in appeal No. 12961 Circuit Court—the condemnation case.]

> "The enforcement of the so-called 'two for one' Agreement between the Bullens and the Haywards and Walter B. Scoville is a personal matter, and is not a matter for settlement in the within case." [Tr. p. 152, Conclusion VII in appeal No. 12961 Circuit Court.]

Appellees submit that Judge Westover did *not* hold said two for one to be an obligation but simply "a personal matter."

Furthermore there has been no evidence produced that the Adamant Company by resolution authorized anyone to even approve the letter of September 27, 1938. The trial court in the case at bar called said fact to the attention of Mr. Hoge by its remarks. [Tr. p. 175.]

No officer of the Adamant Company testified.

Ever since December 14, *1939* Bullen and Hayward have had an action entitled Hershel Bullen, Mary Bullen, J. C. Hayward and Marian S. Hayward, Plaintiffs, v. Walter B. Scoville, Treasure Company, Adamant Company, *et al.,* Defendants, Docket No. 447435 pending in the Superior Court of Los Angeles County based upon this same letter of September 27, 1938 and attempting to enforce its terms as they see it.

Conclusion.

Appellees submit that the judgment of the trial court in this accounting action as rendered against all the appellants is sustained by the evidence and contains no errors as to the appellants.

The appeals are without merit.

Respectfully submitted,

Leland J. Allen,

Attorney for Appellees, Adamant Company and Walter B. Scoville.